of payment is fixed by the law in Rule 12(1) (e) and Schedule C of the Housing Developers (Control and Licensing) Rules, 1970, and the parties are bound to adopt that method. I hold that in respect of each sublot there is a binding contract between the Defendant and the Plaintiff which has been reduced into writing in the form of the document to which I have referred earlier and which both parties have signed, and in which one of the undertakings on the part of the Defendant is that it should get its solicitors to prepare sale and purchase agreement, which undertaking the Defendant is bound to perform.

As to contention (b) it is stated in the Statement of Defence that for approval of the conversion and subdivision of the land for the construction of the houses, the Government has imposed a condition that seven of the terrace houses and three of the bungalow houses to be built should be reserved for the State Development Authority as representative of bumiputra buyers. It is further stated that there is not a single bumiputra among all the 32 intending purchasers including the Plaintiff who made bookings. It is contended that for this reason the contract with the Plaintiff (if there is such a contract) has been frustrated by the condition imposed by the Government. I do not see how this contention can be upheld. It is not stated by the Defendant how many houses were approved by the Government for construction. Besides, it is not a condition imposed by the Government that sublot No. 5 and sublot No. 7 be reserved for the State Development Authority. It is still possible for the Defendant to sell sublot No. 5 and sublot No. 7 to the Plaintiff. I hold that in respect of each sublot there is a contract which has not been frustrated.

This is not a case where the parties had negotiated the terms for sale and purchase agreement and failed to agree on the terms. This is a case where the parties have reached agreement on certain terms and have also agreed to execute a written sale and purchase agreement. This means that it is still open to the parties to negotiate further terms which they have not considered and to include in the written agreement further agreed terms. It is implied that either party undertakes to negotiate any further terms not already agreed upon, if there is any such further terms not already agreed upon. It is submitted on behalf of the Defendant that there is no binding contract because the parties have not finalised the terms to be included in the sale and purchase agreement. The fact is that the Defendant had refused even to negotiate the terms to be included in the sale and purchase agreement, and refused to execute a sale and purchase agreement, and by so refusing it has breached its undertaking under the contract. The Defendant has breached the contract in that it has failed to get a sale and purchase agreement prepared for execution, and it has failed to pursue the matter until completion of sale and purchase of the two houses which it has undertaken to construct and sell to the Plaintiff.

The Plaintiff asks for damages in lieu of or in addition to specific performance. In my opinion, under the circumstances of this case damages is the appropriate and adequate remedy. The amount of damages should be measured by the difference between the current market price of a house in the same locality, of the kind which the Defendant has failed to sell and deliver to the Plaintiff, and the price at which the Defendant had agreed to sell to the Plaintiff, plus the amount of booking fee paid by the Plaintiff. Therefore in respect of the two houses the damages should be $57,100.

Accordingly I give judgment for the Plaintiff in the sum of $57,100 and costs.

Judgment for the plaintiff.

Solicitors: *Hisham, Sobri & Kadir; K. Y. Foo & Co.*

CHIANG BOON FATT v. LEMBAGA KEMAJUAN NEGERI PAHANG & ANOR. CHIN YEE THOW v. LEMBAGA KEMAJUAN NEGERI PAHANG & ANOR.

[O.C.J. (George J.) December 15, 1981]
[Kuantan – Civil Suit Nos. 95 & 131 of 1976]

Damages – Fatal accident – Young man about to enter university – Award of M$15,000 for loss of dependency and M$4,000 for loss of expectation of life

The two actions in this case arose out of the same accident involving a motor van belonging to the first defendant in each suit and driven by the second defendant in each suit and motorcycle ridden by one Chin Yew Fan and Chiang Boon Fatt who was the pillon rider. As a result of the accident both the pillon rider and the rider of the motorcycle suffered personal injuries. Civil Suit No. 131 of 1976 was brought by Chin Yee Thow as administrator of the estate of the deceased Chin Yew Fan. The court found the driver of the motor car solely to blame for the accident. The defendants appealed "against such part only of the said decision as decides that the defendants to pay to the plaintiff in Civil Suit No. 131/1976 damages in the

sum of $4,000 for loss of expectation of life and $15,000 for loss of earnings during the lost years and costs".

The facts revealed that the deceased was about to join the university when the accident occurred.

Held: (1) it has always been the practice in Malaysia to make an award, in a fatal accident claim, of not only an amount under section of the Civil Law Act for the loss of expectation of life but also under section 7 of the Act by way of loss of dependency if on a balance of probability the court could find for such a loss;

(2) "the lost years" referred to in *Pickett's* case has nothing to do with dependency or the loss of it and is a claim (based on legislation similar to section 8(2)(c) of the Civil Law Act) that is available in a fatal accident case whether there was any dependency or not and is for the benefit of the estate of the deceased to be distributed according to the laws pertaining to distribution of the estate of a deceased person;

(3) on the probabilities there was a loss of dependency assessed on the moderate figure of $200 per month which gave $4,000 for 1980 and 1981 and for a period of 5 years at $200 per month which applying the annuity tables gives $10,200 to make a total of $15,000 by way of loss of dependency;

(4) the court applied what was the conventional amount in the fifties and sixties and allowing for the diminution of the value of money awarded the plaintiff $4,000 for loss of expectation of life.

Cases referred to:

(1) *Pickett* v. *British Rail Engineering Ltd.* [1979] 1 All E.R. 774.
(2) *Gammell* v. *Wilson* [1981] 1 All E.R. 578.
(3) *Yang Salbiah & Anor.* v. *Jamil bin Harun* [1981] 1 M.L.J. 292.
(4) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.
(5) *Foon Moon Yeow & Anor.* v. *Tan Sek Kee & Ors.* [1973] 2 M.L.J. 119.
(6) *Thangavelu* v. *Chia Kok Bin* [1981] 2 M.L.J. 277.

CIVIL SUIT.

Joseph Au for the plaintiff.
Mohamed Dzaiddin Abdullah for the defendants.

Cur. Adv. Vult.

George J.: Kuantan Civil Suit No. 131 of 1976 was consolidated with Kuantan Civil Suit No.95 of 1976 and the consolidated suits were heard on the December 10, 1981 when judgment was reserved. On the December 15, 1981 I found for the Plaintiffs in each of the actions.

These two actions arose out of the same motor accident in which a motor van belonging to the first-named Defendant in each suit and driven by the second-named Defendant in each suit came into collision with a motor cycle along Jalan Besar, Kuantan, the rider of which was one Chin Yew Fan, who had a pillion rider, Chiang Boon Fatt, who is the Plaintiff in Civil Suit No. 95 of 1976. As a result of the accident both the pillion rider and the rider of the motor cycle suffered personal injuries. Civil Suit No. 131 of 1976 was brought by Chin Yee Thow as administrator of the estate of the deceased motor cycle rider, whose injuries proved fatal.

I found that the driver of the motor van, as the servant of the first-named Defendant, was solely to blame for the accident. The Defendants have appealed "against such part only of the said decision as decides that the defendants to pay to the plaintiff in Civil Suit No. 131/1976 damages in the sum of $4,000 for loss of expectation of life and $15,000 for loss of earnings during the lost years and costs."

My written judgment is restricted to what is relevant in respect of the proposed appeal.

For the Plaintiff in Civil Suit No.131 of 1976 Encik Joseph Au, of Counsel, submitted that (apart from certain special damages) there should be judgment for loss of expectation of life in the sum of $4,000 and that there should be judgment for a further sum (for what he called the lost years) computed on the basis of loss of dependency at $300 per month for 7 years on the assumption that the deceased, had he not met with the accident, would have graduated from the University of Malaya and would have been gainfully employed as a graduate from about 1980 and in all probability would have made a contribution to his parents for their maintenance in the sum of about $300 per month and that a reasonable period of purchase to be given should be 7 years.

Encik Mohd. Dzaiddin Abdullah of Counsel for the Defendants argued that the Plaintiff was not entitled to an amount either in respect of loss of expectation of life or for the "lost years" as neither of these alleged losses were pleaded in the Statement of Claim. He further argued that in any event the amount to be given for loss of expectation of life should be $3,500 because in his submission that is the conventional sum and that in any event that was what was stated by the Plaintiff as the amount expected for loss of expectation of life in the petition for Letters of Administration. At best the amount to be given for the "lost years" should be computed on the basis of $150 per month for 5 years.

I awarded $1,900 by way of special damages (in respect of which there is no complaint), $4,000 for loss of expectation of life and a further sum of $15,000 which in my oral judgment I had referred to (in the context of the arguments by Counsel) as "for the so-called lost years" which unfortunately was misleading in that in fact that amount of $15,000 was awarded by way of loss of dependency for the parents of the deceased and no award was sought for or made under the head of damages described as "the lost years" by Lord Wilberforce in *Pickett* v. *British Rail Engineering Ltd.*[1].

It has always been the practice in Malaysia to make an award, in a fatal accident claim, of not only an amount under section 8 of the Civil Law Act for the loss of expectation of life but also under section 7 of the Act by way of loss of dependency if on a balance of probability the court could find for such a loss.

Where there is a claim for loss of dependency the court evaluates the quantum of the loss and this is normally done by gathering from the evidence, *inter alia*, whether there were dependants, what, if any, was the amount made available by the deceased prior to his death and assessing how much and for what period or further period the deceased would have made payments to his dependants had he not met with his untimely death.

The "lost years" referred to in *Pickett's case* has nothing to do with dependency or the loss of it and is a claim (based on legislation similar to section 8(2)(c) of our Civil Law Act) that is available in a fatal accident case whether there was any dependency or not and is for the benefit of the estate of the deceased to be distributed according to the laws pertaining to the distribution of the estate of a deceased person.

In his speech in *Pickett's case*, Lord Edmund-Davies asked (page 789), "Is it right that in calculating an award for loss of future earnings, it should be restricted to the sum which the injured plaintiff would have earned (but for the accident) during what remains of his shortened life, or should he be further compensated by reference to what he could reasonably have been expected to earn during such working life as would in all probability been left to him had it not been cut down by the defendant's neligence? In short, is he also entitled to be compensated for what have conveniently been called the 'lost years'?" He went on to answer the question by agreeing with the views of Lord Wilberforce, Lord Salmon and Lord Scarman (there was a dissenting speech, that of Lord Russell) that in assessing compensation the "lost years" must be taken into account.

In the instant case although the phrase "lost years" was used by both counsel in their submissions and by me in delivering my decision, it was not given the meaning ascribed to it in *Pickett's case*. In fact no claim was made for the "lost years" under section 8(2)(c) and no award was made for them.

I reproduce the last three paragraphs of the Statement of Claim:

"6. As a result of the negligence of the Second Defendant the Plaintiff has suffered loss and damages.

Particulars of Special Damages

(a) Funeral expenses, including coffin and other articles for the funeral and burial	... $2,500/-
(b) Transport	500/-
	$3,000/-

7. The deceased prior to his death was a private tutor and earning approximately $400/- to $450/- per month. Out of this amount the deceased gave to his father and mother the sum of $250/- per month for their maintenance. The father is Chin Yee Thow, age – 52 years and the mother is Chong Chook Yin, age – 48 years.

8. The Plaintiff claims:–

(a) Special damages – $3,000/-

(b) Damages under sections 7 and 8 of the Civil Law Act 1956;

(c) Any other relief as the Honourable Court deems fit and proper;

(d) Costs."

The Statement of Claim as settled and in spite of amendments made to it in the course of the trial was certainly not a masterpiece of draftsmanship. But inelegant as it was, it contained sufficient material to sustain a claim for loss of expectation of life and for loss of dependency as well as for special damages. By paragraph 6 the Plaintiff contended that "the Plaintiff has suffered loss and damages" and went on to claim "(b) Damages under sections 7 and 8 of the Civil Law Act 1956", which put the Defendants on notice as to the claims levelled against them. The contention that neither of these losses were pleaded in the Statement of Claim has no merit.

No evidence was led on the contention in the Statement of Claim that the deceased had been a private tutor and that he had given his parents

$250 per month for their maintenance, perhaps because evidence was led through the father of the deceased that his son, the deceased, had obtained admission to the University of Malaya and was scheduled to join the University on the May 26, 1975 (the accident was on May 24, 1975), after which if in fact he had been giving tuition he would have ceased to do so.

Now, the deceased and Chiang Boon Fatt, the Plaintiff in the other suit 95 of 1976, were good friends and they were both successful in their applications to be admitted into the University and in fact both of them were scheduled to join the University on the May 26, 1975 and in all probability would have done so had they not suffered injuries as they did just two days earlier.

There was evidence that Chiang Boon Fatt, because of his injuries, had to delay joining the University for a year and then went on to graduate, was unemployed for a year and then obtained employment and earned about $12,000 during the first year of employment and continues to be employed as an officer in a bank.

On the claim for loss of dependency, the court had to decide on probabilities as to what would have happened if the accident had not occurred. The deceased was apparently such a good student that he had gained admission straight into the 2nd year in the University. In all probability he would have joined the University as scheduled and would have graduated and it seems to me that with the evidence available in respect of the career of the deceased's friend, Chiang Boon Fatt, it was not unreasonable to conclude that the probabilities were that the deceased would have had a similar career and would have been in a position to provide his parents with funds to help in their maintenance and would have done so from at least the year 1980 at which stage his parents would be in their mid-fifties.

The alleged loss of dependency is as much a pecuniary loss as an alleged loss of earnings and a passage from Lord Scarman's speech in *Gammell* v. *Wilson*[2] at page 593 is relevant:

"The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capactiy will ordinarily be so distant that assessment is mere speculation."

Mr. Chin Yee Thow perhaps should have been asked questions as to his expectation from his son had that young man not met with his untimely death but this and one or two other relevant questions were not asked no doubt because the man in the course of giving his evidence was so overcome with grief that he had to be hastily excused from the court, but not before I had time to observe that he was a middle-aged man obviously from the lower middle rung of the economic ladder.

With such evidence as was available I had to do the best I could as the Federal Court did in *Yang Salbiah & Anor.* v. *Jamil bin Harun*[3] and in the event, I held on the probabilities that there was a loss of dependency assessed on the moderate figure of $200 per month which gave $4,800 for the two years 1980 and 1981 and for a further period of 5 years (again as much as the lower end of the scale as the $200) also at $200 per month which applying the annuity tables gives $10,200 to make a total of $15,000 by way of loss of dependency.

The conventional amount awarded for the loss of expectation of life crept up from $2,500 in the early fifties to $3,000 in the late fifties. In *Lee Sai Cheong* v. *Wan Lim Cheong*[4] the Federal Court in a reasoned view reduced an award of $5,000 to $3,000 as being in the view of Federal Court the conventional award to be made in the case of a young adult. One decade later Sharma J. in *Foon Moon Yeow & Anor* v. *Tan Sek Kee & Ors.*[5] awarded $3,500 and an appeal against this award was dismissed.

In the instant case, tried almost another decade later, we have a young man about to enter University who dies. Applying what was the conventional amount in the fifties and sixties and allowing for the diminution of the value of money I felt that I would not be running foul of what Thomson C.J. (as he then was) in the 1962 case, referred to as "judicial legislation", in awarding $4,000 for loss of expectation of life and I so did. In doing so I was not aware of the fact that in the judgment of the Court in *Thangavelu* v. *Chia Kok Bin*[6] there is a reference to an award of the Federal Court (Civil Appeal 172/78) of $4,000 for loss of expectation of life.

What was stated in the petition of Letters of Administration as the expectation for this loss to the estate (S$3,500) is in my view quite relevant.

Order accordingly.

Solicitors: *Malek & Joseph Au; Dzaiddin & Co.*